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Nos. 78-1545 and 80-951 (Consolidated)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

ANNE B. ZIPES, et al.,

*Petitioners,*

*vs.* No. 78-1545

TRANS WORLD AIRLINES, INC.

*Respondent.*

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

*Petitioner,*

*vs.* No. 80-951

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, et al.,

*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR TRANS WORLD AIRLINES, INC., RESPONDENT IN NOS. 78-1545 AND 80-951

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## BRIEF FOR TRANS WORLD AIRLINES, INC., RESPONDENT IN NOS. 78-1545 AND 80-951

## STATEMENT OF THE CASE

This class action litigation under Title VII of the Civil Rights Act of 1964,[1] begun in 1970 to invalidate an airline's practice of terminating flight attendants on pregnancy, is now a three-way contest.

[1] 42 U.S.C. 2000e *et seq.* Relevant sections as they existed during 1965-1970 are quoted in the appendix to this brief.

Respondent Trans World Airlines, Inc.,[2] defendant in the litigation, opposes the petitioners in Nos. 80-951 and 78-1545 on some issues and agrees with them on others.

In No. 80-951 the petitioner Independent Federation of Flight Attendants, the union of current TWA flight attendants, seeks to reverse two district court orders, one approving a settlement and the other granting retroactive seniority to employees to be reinstated under the settlement. The union objects that the settlement and grant of retroactive seniority are (1) contrary to the collective bargaining rights of the union's members and (2) invalid for lack of subject matter jurisdiction because the court of appeals in a prior appeal had held many plaintiff class members had not complied with a Title VII time limit.[3]

The class action plaintiffs as respondents in No. 80-951, who were TWA flight attendants terminated on pregnancy during 1965-69, support both the settlement approval and seniority orders although denying the alleged lack of jurisdiction. TWA, although agreeing with and not opposing the court of appeals ruling on lack of jurisdiction, supports both the settlement approval and seniority orders.

In No. 78-1545, the class action plaintiffs as petitioners seek to reverse the court of appeals' decision that their failure to comply with the Title VII time limit was not subject to waiver or estoppel. TWA as respondent in No. 78-1545 seeks affir-

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[2] As required by Rule 28.1 of this Court, Trans World Airlines, Inc. states that it is a subsidiary of Trans World Corporation, of which Hilton International Co., Canteen Corporation, Spartan-Newfoods Corp., and Century 21 Real Estate Corporation are also subsidiaries.

[3] These objections are stated in questions 1 and 2 in the Union's brief, p. (i), a reversal of the order of similar questions in its petition for certiorari. A Question 3 in the petition, which dealt with the district court finding (affirmed by the court of appeals) of the adverse impact of retroactive seniority on incumbent employees, was removed by this Court's order of May 18, 1981 as improvidently granted.

mance of the court of appeals holding. The union is not a party in No. 78-1545.

This brief does not deal with the issues in No. 78-1549, in which TWA as petitioner mainly seeks reversal of the district court summary judgment that TWA's pregnancy practice was unlawful sex discrimination under Title VII in 1965-1970. This Court granted TWA's certiorari petition on March 9, 1981 when it granted the petition in No. 78-1545, but its order of May 18, 1981 deferred consideration of No. 78-1549 and removed it from the argument calendar.

*Amicus curiae* briefs have been filed by the AFL-CIO, supporting the union's contention in No. 80-951, and by the United States and the Equal Employment Opportunity Commission, supporting the plaintiffs' contentions in Nos. 80-951 and 78-1545. The Equal Employment Advisory Council is filing an *amicus* brief in support of TWA.

***The facts of the litigation, which are detailed in other briefs, are clarified by a chronology of the major events:***

**1970**

Flight attendants' union filed separate, companion Title VII class actions against American Airlines and TWA attacking practice of terminating flight attendants on pregnancy (Aug.).

Pregnancy practice eliminated by both airlines (Oct.).

**1971**

Settlement agreements between both airlines and the plaintiff class members (represented by the one union), providing for return to work of terminated plaintiffs without back pay or retroactive seniority, were filed, and notice of hearing was directed for August 30 (July). I J. A. 19a-26a.

EEOC's motion to intervene to object to both settlements was denied (Aug. 11), and EEOC appealed. Court of appeals stayed hearing (Aug. 25).

1972

Court of appeals affirmed denial of EEOC intervention. *ALSSA* v. *American Airlines, Inc.*, 455 F. 2d 101 (Jan.).

Objections to settlements were filed (March).

Hearing was held on settlements resulting in orders of approval (March).

Objectors appealed in both cases (April).

1973

Settlements in both cases were set aside by court of appeals because of plaintiff union's conflicting interest in retroactive seniority. *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (December).

1974

Certiorari petitions of both airlines were denied. 416 U. S. 993 (May).

1976

Summary judgments were entered against American (Apr.) and TWA (Oct.), each holding Title VII was violated by the pregnancy practice. Orders were entered holding Title VII time limit was complied with by plaintiffs in each case.

1977

Joint American-TWA brief on appeal was filed in Seventh Circuit (May).

Settlement between American and class plaintiffs was negotiated and approved in district court over objection of union of current employees (Aug.-Sept.).

1978

TWA's appeal from summary judgment and time limit orders and the union's appeal from American settlement approval were argued in court of appeals (Jan.).

Approval of American settlement was affirmed. *ALSSA* v. *American Airlines,* 573 F. 2d 960 (March), cert. den. 439 U. S. 876 (Oct.).

Court of appeals (Aug.) affirmed summary judgment of violation of Title VII by TWA, but many plaintiffs were held to have failed to comply with Title VII time limit. *In Re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F. 2d 1142. Pet. App. 80-951, p. 40a-58a.

**1979**

Court of appeals denied petitions for rehearing (Jan.).

Plaintiffs filed certiorari petition No. 78-1545, and TWA filed cross certiorari petition No. 78-1549 (Apr.) from decision in 582 F. 2d 1142.

On motion of parties, Supreme Court deferred ruling on certiorari petitions because of settlement negotiations (June 4).

Settlement agreement was entered into (June 18) between plaintiffs and TWA. Class members were reinstated as flight attendants. TWA agreed to pay $1,500,000 to Subclass A members (held to have complied with time limit) and $1,500,000 to much larger Subclass B (held not to have complied with time limit). Seniority of reinstated class members was provided to be determined by court in its discretion without contest or objection by TWA. Pet. App. 80-951, pp. 23a-39a.

Union granted leave to intervene (July 19).

Hearing on settlement (Oct.).

District court (Nov.) entered (1) an order approving settlement as fair, reasonable, and adequate, dismissing actions, and (2) an order awarding retroactive seniority to reinstated class members. *id.* p. 16a, 18a.

**1980**

On union appeal from both orders, court of appeals affirmed both (June). *id.* p. 1a. *ALSSA* v. *TWA,* 630 F. 2d. 1164.

Court of Appeals denied union petition for rehearing (Sept.). *id.* p. 11a.

Union's certiorari petition filed in No. 80-951 (Dec. 13) from decision in 630 F. 2d 1164.

**1981**

Certiorari granted on petitions in Nos. 78-1545 and 1549 and No. 80-951 (March 9).

Supreme Court order denied TWA's motion to limit review in No. 80-951 to order approving seniority, deferred consideration of No. 78-1549, limited review of No. 80-951 to Questions 1 and 2 in union petition, and dismissed Question 3 (May 18).

*Alternative results from the grants of certiorari in Nos. 80-951, 78-1545, and 78-1549 are significant:*

*First.* If in No. 80-951 the settlement approval and seniority orders are *affirmed,* the petitions in No. 78-1545 and No. 78-1549 would be treated as moot and this Court would direct dismissal of the action in accordance with settled practice. *Preiser* v. *Newkirk,* 422 U. S. 395, 403-4 (1975). This result would accord with the provisions of the order approving the settlement (Pet. App. 80-951, p. 17a). The litigation would be ended.

*Second.* If in No. 80-951 the settlement approval order is *affirmed* and the seniority order is *reversed,* the petitions in No. 78-1545 and No. 78-1549 would be treated as moot and dismissal would be ordered as in the first alternative. The decision on retroactive seniority would depend on whether the seniority order was reversed without remanding or was reversed for further consideration by the court of appeals or the district court.

*Third.* If in No. 80-951 the settlement approval order is *reversed,* the seniority order would probably require reversal

also, depending on the reasons for reversal of the settlement approval order. Then review in No. 78-1545 would be required.

*Fourth.* If in No. 78-1545 this Court *affirms* the court of appeals decision excluding from the plaintiff class those who had failed to comply with the Title VII time (i.e., Subclass B), the questions presented in No. 78-1549 (deferred for consideration by this Court's order of May 18, 1981) would remain for review as to those not excluded (i.e., Subclass A). The questions reviewed in No. 78-1549, with various alternative results, would be whether (a) it was illegal sex discrimination under Title VII during 1965-70 for TWA to terminate pregnant flight attendants without maternity leaves of absence and reinstatement after childbirth; (b) the plaintiffs were entitled to summary judgment on the issue; (c) the remedies should be prospective only; and (d) the Title VII time limit was complied with by formerly pregnant flight attendants working at ground positions or whose children were born during the relevant period.

*Fifth.* If in No. 78-1545 this Court *reverses* the court of appeals decision on exclusion of Subclass B members and disposes of (or remands for determination) the issues of waiver and estoppel raised by the petitioners, questions (a)-(d) in No. 78-1549 noted in the fourth alternative would be reviewed and the decisions would affect all members of Subclasses A and B held not barred by the Title VII time limit.

*Details in petitioners' Statements of the Case require correction:*

The plaintiffs (brief, pp. 4-9) repeatedly use the disparaging and inaccurate term "no mothers policy" in referring to TWA's practice of terminating flight attendants on pregnancy. This changes the plaintiffs' position from the allegations of the complaint, which used only the words "pregnancy" and "termination of employment" in attacking the TWA practice as

unlawful sex discrimination[4] (1 J.A. 6a). No allegation used the words "mother" or "motherhood". As the pleadings indicated, flight attendants terminated on pregnancy during 1965-1970 were denied work because of the disabilities of pregnancy, not because they were mothers.

Plaintiffs' brief contains serious factual misstatements relating to the merits of the question involved in Docket No. 78-1549. Although No. 78-1549 has been deferred, TWA corrects these misstatements lest they be repeated. First, plaintiffs' brief (p. 4) incorrectly states that before 1970 the responsibilities of its pursers "were substantially the same as those of female flight attendants." As TWA pointed out in its cross petition for certiorari in No. 78-1549 (pp. 9-10), there is no factual support in the record here for such a statement, and the issue was not litigated in this case. TWA's contrary assertion in other litigation—that the duties and responsibilities of both male and female pursers before and after 1970 were sufficiently greater than those of other flight attendants to justify a pay differential—is precisely the issue which was tried at length and is awaiting decision in the United States District Court for the Southern District of New York, *Maguire* v. *TWA*, 70 Civ. 3947. Second, plaintiffs' brief (p. 4, n. 10) quotes TWA's answer[5] to an interrogatory as if it were a description by TWA of its own employment practice. In fact, the interrogatory asked TWA to state the substance of the charge filed against it by plaintiff Maguire, and TWA's answer was only a statement of her charge and not its practice.

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[4] Paragraph 7, the only allegation on violating Title VII and the basis of the entire litigation, made termination of employment on pregnancy the sole unlawful practice (I J. A. 6a). Termination on pregnancy was the occurrence used in defining the class in court orders (I. J. A. 19a, 91a, 96a) and in the settlement agreement (Pet. App. 80-951, p. 24a).

[5] That answer is not in the Joint Appendix or any other appendix and is found in the record as Record No. 64; it answered an interrogatory (R. 57) asking TWA to state the substance of the charge Ms. Maguire filed with the EEOC.

TWA's pleading of plaintiffs' noncompliance with the Title VII time limit is incorrectly described twice in plaintiffs' brief. Plaintiffs' statement (p. 5) that TWA's answer "did not raise lack of timeliness as a defense" is half true because the answer did not allege noncompliance with the time limit as an "affirmative defense". But, as explained at pp. 44-5 of this brief, plaintiffs' allegations in the complaint of filing the EEOC charge on a certain date was denied in TWA's answer by pleading no knowledge of the plaintiffs' allegation. Plaintiffs are wrong for two reasons when they say that "TWA has never filed an amended answer despite having received leave to do so" (pp. 8, 35). TWA's motion to amend the answer set forth the text of the affirmative defense sought to be pleaded (I J.A. 99a). Further, TWA actually did file the amendment as a separate paper on November 25, 1974, Record No. 25 in District Court Docket No. 70-2071.

The fact that two District Court orders are before the Court in No. 80-951 is obscured by the union's brief (p. 3), which states that the "judgment under review in No. 80-951 is "an order of the District Court, . . . which approves a 'settlement agreement' ". Two separate orders were entered, one entitled "Order Approving Settlement and Dismissing Actions" (Pet. App. 80-951, 16a), and the other "Order Awarding Seniority" (*id.* p. 18a). The union's notice of appeal, which specifically named each order, has brought them both before the Court.

## SUMMARY OF ARGUMENT

TWA urges the Court to affirm the settlement approval order regardless of its decision on the subsidiary seniority order. Then the litigation can be terminated by performance of the 1979 settlement contract, which has been postponed for two years by the union's appeal from the settlement order. The end of this 1970 litigation is highly desirable because it has been greatly protracted despite TWA's abandonment of the alleged Title VII violation in 1970 and its efforts to settle the claims of terminated employees in 1971.

### I (No. 80-951)

A. The arguments of the union and the amicus AFL-CIO against the settlement approval order would, if sustained, prevent settlements of Title VII class actions under which retroactive seniority is to be decided by district courts. In requiring proof of plaintiffs' time limit compliance and defendant's violation of Title VII, their arguments would defeat the major settlement purpose of avoiding the delay and expense of the trial of complex and extensive issues.

It is common practice for settlement arrangements to leave disputed matters for court determination, such as a dispute with third persons over retroactive seniority. Decisions of courts of appeals sustaining the practice have included the companion American Airlines case. The broad equitable powers granted district courts by the Judicial Code and by Title VII include, by implication, the ancillary authority to approve settlements of class actions and determine retroactive seniority for employees reinstated under a settlement. The implication is supported by the public policy favoring the settlement of litigation, which is particularly strong in Title VII cases.

A contested decision of unlawful discrimination is not required for an award of retroactive seniority in connection with a settlement. The district judge, in considering a settlement, has before him materials on the defendant's alleged liability that

will permit him to make a sound judgment of the amount of retroactive seniority to be awarded. In this case these materials included the discovery record that produced a summary judgment of TWA's violation of Title VII, affirmed by the court of appeals.

Decisions of this Court answer the union's contentions that, without union consent, an award of retroactive seniority is forbidden by the collective bargaining agreement between TWA and the union, by § 703(h) of Title VII, by the Railway Labor Act, and by the due process clause of the Fifth Amendment.

B. The union's second major contention is that the district court lacked subject matter jurisdiction over the claims of Subclass B members who, under an earlier court of appeals decision, had not complied with the Title VII time limit that was held to be a jurisdictional prerequisite. A crucial answering fact is that the court of appeals decision on jurisdiction was pending on review in this Court at the time of the settlement. The strong judicial policy in favor of settlements outweighs the policies behind the strict rules of subject matter jurisdiction which the union asks the Court to apply.

**II (No. 78-1545)***

A. Plaintiffs and the EEOC seek to overturn exclusion of the claims of the Subclass B plaintiffs on the ground that the court of appeals was wrong in stating that the relevant Title VII time limit was a jurisdictional requirement, precluding a finding of waiver or estoppel. The court of appeals was supported by similar statements of this Court and courts of appeals in the Seventh Circuit and elsewhere. Other courts of appeals decisions, cited by the plaintiffs and the EEOC, have rejected the jurisdictional idea with the statement that the time limit is like or analogized to a statute of limitations. But none have adopted the repeated statement of the EEOC's amicus brief that the time limit "is an ordinary statute of limitations." A third alternative, not as strict as a jurisdictional requirement nor as

* Point II will not be reached if the settlement approval order is affirmed in No. 80-951. See first and second alternatives, above p. 6.

loose as an "ordinary statute of limitations", is that the time limit is a prerequisite or condition precedent of the claim for relief under Title VII. Courts of appeals decisions have so referred to the Title VII requirement.

The provisions in § 706 of Title VII that a district court action must be preceded by an EEOC charge and, in some instances, a state proceeding differentiate the Title VII time limit from an "ordinary statute of limitations." The legislative history so indicates because, without these preliminary requirements, Title VII could not have been enacted. It is a reasonable inference from the statutory provisions, the legislative history, and procedural attributes that the time limit is more in the nature of a condition precedent or jurisdictional requirement than an "ordinary statute of limitations."

B. The plaintiffs' waiver and estoppel arguments are too weak to provide an appropriate occasion for this Court to decide the nature of the Title VII time limits. The arguments do not excuse the failure of the Subclass B plaintiffs to file EEOC charges within 90 days after their termination for the alleged unlawful discrimination. The arguments, based on the doubtful claim that the time limit is an ordinary statute of limitations, are that TWA (a) waived time limit noncompliance by not pleading it affirmatively and (b) intentionally failed to plead it in order to mislead the plaintiffs into appealing from the order approving the 1971 settlement in the belief that time limit noncompliance would not be raised if the settlement were disapproved. TWA's denial by answer of plaintiffs' allegations of the filing of the EEOC charge informed the plaintiffs that time limit compliance was a disputed issue. There was no waiver even if the time limit is an ordinary statute of limitations. The same fact destroys the plaintiffs' elaborate estoppel contention as do record proofs that the plaintiffs and their counsel were well aware of the disputed issue of time limit noncompliance before they appealed from the approval of the 1971 settlement.

## ARGUMENT

TWA urges the Court to affirm the settlement approval order (Pet. App. 80-951, p. 16a) regardless of its decision on the subsidiary seniority order (*id.* p. 18a). This proceeding, which can then be terminated by performance of the settlement,[6] has developed into a stereotype of protracted litigation, burdensome to the courts[7] and litigants. TWA abandoned the alleged Title VII violation in October 1970, two months after the action was filed with a companion case against American Airlines, Inc. TWA's settlement in 1971 with the class of terminated employees was overturned on appeal on the issue of retroactive competitive seniority (490 F. 2d 636) and certiorari was denied. The settlement of the companion American Airlines case in 1977 was approved over the objection to retroactive seniority by its current employees' union. 573 F. 2d 960. The union lost the appeal and an attempted certiorari. But when TWA made a similar settlement in 1979 and a union's similar objection was unsuccessful in the lower courts, the union obtained the grant of certiorari now pending in No. 80-951. The end of the litigation remains obscure until this Court affirms the settlement approval order.

By objecting to the settlement itself and not merely to the grant of retroactive seniority, the union has held up for over two years the settlement approval required by Rule 23(e) of the

[6] The petitions in Nos. 78-1545 and 78-1549 would become moot and this Court would direct dismissal of the action. *Preiser* v. *Newkirk*, 422 U. S. 395, 403-4 (1975). Under the settlement agreement, this Court's order affirming the settlement approval order would "render such order no longer subject to review or modification" and would become the "Final Order Date" that would set the stage for performing the agreement (Pet. App. 80-951, pp. 27a, 35a-36a). See also the first alternative explained on p. 6.

[7] There have been four successively assigned district judges and five appeals to the Court of Appeals for the Seventh Circuit. See reference to opinions, *Brief for Plaintiff class*, pp. 1-2.

Federal Rules of Civil Procedure. However, the union members' interest against retroactive seniority for the plaintiffs could be adequately protected if this Court, in sustaining any union objection, applied it to the seniority order while affirming the settlement order.

## I.

## SETTLEMENT AND SENIORITY ORDERS SHOULD BE AFFIRMED (No. 80-951)

### A. Validity of Determination of Retroactive Seniority for Reinstated Plaintiffs

Contrary considerations are overlooked by the union and the AFL-CIO when they contend the district court could not validly determine retroactive seniority for reinstated plaintiffs. The union and the AFL-CIO argue that such a determination requires a finding of the plaintiffs' right to recover under Title VII and is forbidden, without the union's consent, by the collective agreement between TWA and the union, § 703(h) of Title VII, the Railway Labor Act, and the due process clause of the Fifth Amendment. If sustained, any of these arguments would prevent the settlement of a Title VII class action that provided for judicial determination of retroactive seniority.

#### 1. Court Determination of Seniority an Authorized Practice in Settlements

#### (a) Recent Precedents

It is common practice for settlement arrangements, by consent decree or otherwise, to leave disputed matters to be determined by the court. An outstanding example, close to the subject matter of the present litigation, is the consent decree entitled "Decree in Partial Resolution of Suit" in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 330

n4 (1977). The decree provided that the district court would decide whether unlawful discrimination had occurred and also "whether any discriminatees should be awarded additional equitable relief such as retroactive seniority." The teamsters union was a defendant with the employer. This Court, after holding that the union's conduct in agreeing to and maintaining a seniority system did not violate Title VII, directed the union to remain in the litigation so that full relief might be awarded the victims of the employer's discrimination (p. 356 n43). A union not guilty of unlawful discrimination was thus recognized as a proper party in a judicial determination of retroactive seniority as a remedy for the employer's discrimination.

Court of appeals decisions, without any contrary holding we know of, have sustained the practice of district court determination of retroactive seniority over the objection of the current employees' union in connection with the settlement of a Title VII class action. In *EEOC* v. *American Tel. & Tel. Co.*, 556 F. 2d 167, 173-4 (3rd Cir. 1977), unions were permitted to intervene to modify a consent decree that was alleged to conflict with their collective agreements and to invade the competitive seniority rights of their members. The union's contention was rejected in language that applies directly to the contentions of the union and the AFL-CIO here:

> "To the extent that third party rights in which the unions are interested have been affected, they were allowed to intervene and be heard in this case . . . If this were a litigated judgment the fact that they and their members did not cause the discrimination would not prevent relief affecting third parties. See *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 778 . . . (1976). At best, in a fully litigated case, they would be entitled to be heard only on the appropriateness of the remedy. They have been heard on that aspect of the case. . . .

Judicial determination of seniority pursuant to a settlement, attacked as here in American Airlines' companion case, was

approved by the Seventh Circuit. *ALSSA* v. *American Airlines*, 573 F. 2d 960, 964 (7th Cir. 1978), *cert. den.* 439 U. S. 876. The opinion said at most the court was required to permit the union an opportunity to present to the court its members' interests in the proposed remedy and this was done. To the same effect were *Moore* v. *City of San Jose*, 615 F. 2d 1265, 1271-2 (9th Cir. 1980); *Meadows* v. *Ford Motor Co.*, ____ F. 2d ____, 25 EPD ¶31717 (6th Cir. 1981).*

**(b) Basis of District Court's Authority in a Title VII Settlement**

District courts have broad equitable powers in Title VII cases, including an award of retroactive seniority in a settlement remedy. § 1343(4) of the Judicial Code gives district courts original jurisdiction of any civil action "to secure equitable or other relief" under any federal statute "providing for the protection of civil rights." § 706(g) of Title VII, in describing the remedies in a contested action if the court finds the defendant engaged in "an unlawful employment practice", authorizes the court to "order such affirmative action as may be appropriate" including reinstatement, etc., or "any other equitable relief as the court deems appropriate." It is true that the authority exercised by the district court in a settlement is not expressly mentioned in Title VII. But consent decrees have been traditional procedural devices in courts of equity for generations. The authority over settlements is especially appropriate in Title VII actions. Compromises were expressly encouraged by Congress in Title VII. *Alexander* v. *Gardner-Denver*, 415 U. S. 36, 44, 50 (1974). As recently said in *Carson* v. *American Brands*, ____ U. S. ____, 67 L. Ed. 59, 67, quoting the *Alexander* opinion, "In enacting Title VII, Congress ex-

* Unlike these cases, a decision relied on by the union (pp. 24-5), *High* v. *Braniff Airways, Inc.*, 592 F. 2d 1330 (5th Cir. 1979), is entirely different from the present case. There a union was a signatory of a settlement agreement that was modified without the union's consent and without a court hearing on the union's objection. The case was remanded for further proceedings on the modification. The case would be relevant, and then only on the seniority order and not the settlement approval order, if TWA and the plaintiffs had provided for retroactive seniority and the court had not permitted the union to be heard in objection.

pressed a strong preference for encouraging voluntary settlement of employment discrimination claims."[8]

By analogy or direct relevance, a court of equity's authority to deal with retroactive seniority in a settlement is within the principle that a private right of action will sometimes be implied under a federal statute that provides other remedies, as explained in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975) and later cases.[9] The four-step analysis explained in the *Cort* opinion makes it even easier to imply such authority than to imply a private right of action under a statute not expressly providing for it. The authority meets the *Cort* test because Title VII is a statute creating a federal right; the legislature did not indicate an intent to deny such a remedy; the authority is not merely consistent with, but almost necessary to, the underlying purpose of the legislative scheme to imply it; and there is no tradition that would relegate the remedy in a federal action to state law. The award of such an affirmative remedy as retroactive seniority, held to be permitted by Title VII in contested litigation in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 763, 769 (1976), has accordingly been treated as an authorized practice in connection with a settlement, as by this Court in *Teamsters* and by courts of appeals in *American Airlines, AT&T,* and *Moore* noted above (pp. 14-16).

Thus, since the district court's authority to award retroactive seniority in a settlement is within the court's implied

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[8] To the same effect, in one of the earlier appeals in the present litigation, see *ALSSA* v. *American Airlines*, 455 F. 2d 101, 109 (7th Cir. 1972). Contrary to plaintiffs' footnotes 68 and 89 (brief, pp. 32, 40), Justice Powell's dissent in *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 401 (1977) cited this case and not "the Seventh Circuit's affirmance of the settlement and seniority award in the American Airlines case." That affirmance was not until 1978 in 573 F. 2d 960.

[9] *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 197; *Cannon* v. *Advisor University of Chicago*, 441 U. S. 677, 688 (1979); *Trans America Mortgage* v. *Lewis*, 444 U. S. 11, 23-24 (1979); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575-576 (1979).

powers, it was not "conferred" by the settlement agreement nor by the requirement of court approval in Rule 23(e) of the Federal Rules of Civil Procedure, as the union argues may not be done (p. 44).[10] So settlement approval under the rule and an award of seniority in connection with it do not extend jurisdiction in violation of Rule 82, as the union contends (*id.*). Nor does Rule 23(e) violate the Rules Enabling Act by modifying the substantive rights of current employees who may be adversely affected by the award of retroactive seniority. The rule merely requires application of the "judicial process for enforcing rights and duties recognized by substantive law." *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14 (1941).

**2. Contested Decision of Unlawful Discrimination Not Required**

Both the union (pp. 27-30) and the AFL-CIO (p. 10) argue in effect that the award of retroactive seniority was invalid because there was no *res judicata* of TWA's unlawful discrimination under Title VII. The argument is based on the provision in § 706(g) for various remedies following a conditional clause:

> "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint."

As the union explains, this condition was quoted or paraphrased in opinions holding or stating that seniority relief was an appropriate remedy under § 706(g). *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 762 (1976). *United Airlines* v. *Evans*, 431 U. S. 553, 558-559 (1977). *Trans World Airlines,*

[10] A relevant analogy is the recent amendment of § 5 of the Clayton Act (Title 15, § 16, 1981 Pocket Part, U. S. C. Ann.) to provide a procedure for consent judgments submitted by the United States in antitrust cases. Congress did not consider it necessary to confer authority on district courts to enter consent judgments. The statute acknowledged that the courts have implied powers to enter such judgments.

*Inc.* v. *Hardison*, 432 U. S. 63, 79 n12 (1977). However, these cases do not hold that a final contested decision of unlawful discrimination is necessary when retroactive seniority is decided in connection with a settlement.

Both the union and the AFL-CIO fail to consider the fact that the district court here actually held that TWA's pregnancy practice during 1965-1970 was unlawful discrimination in violation of Title VII; and that this holding was affirmed by the court of appeals in *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142 (1978). It is true that, at the time of the district court determination of retroactive seniority, TWA's certiorari petition in No. 78-1549 to reverse the finding was pending so that the finding of discrimination was subject to reversal.[11] Thus the union's position is that no effect should be given to a finding of unlawful discrimination if it is subject to review. The union's contention would prevent any settlement with retroactive seniority without an irreversible finding of unlawful discrimination, i.e., a decision by this Court.

Further, when a Title VII action is settled, a finding of violation is not a pre-condition of an award of seniority. Although lacking the evidence needed to determine a disputed issue of discrimination at a trial, a district judge who has considered the factors involved in approving a settlement will have the materials required for a sound judgment of the amount, if any, of retroactive seniority to be awarded reinstated employees. Approval of the settlement requires the district judge to "weigh the probabilities and possibilities of a victory or defeat as indicated by the legal or factual situation presented." *United Founders Life Ins. Co.* v. *Consumers Nat. Life Ins. Co.*, 447 F. 2d 647, 655 (7th Cir. 1971). The "most important

[11] Here the union is very inconsistent. The union's brief elsewhere (p. 38) emphasizes and relies heavily, as a ground for reversal, on the court of appeals holding that subject matter jurisdiction was lacking for the claims of the Subclass B members for their failure to comply with the Title VII time limit, for which the plaintiffs had filed a certiorari petition in No. 78-1545.

factor" for the district judge to consider is the "strength of the case for plaintiffs on the merits" balanced against the benefits of settlement to the defendant.[12] See *Grunin* v. *International House of Pancakes*, 513 F. 2d 114, 124 (8th Cir. 1975), *cert. den.* 423 U. S. 864; *Moore* v. *City of San Jose*, 615 F. 2d 1265, 1271 (1980), where the "probable outcome of the litigation" was a factor in considering the effect of a settlement on incumbents; *Manual for Complex Litigation*, § 1.46. In the present case, the district judge deciding the amount of retroactive seniority had relevant materials to consider in weighing the probability that TWA would have been held to have violated Title VII in terminating the plaintiffs.[13]

Thus a Title VII court of equity, without a contested decision on the defendant's violation of Title VII, has ample means to determine the reasonable amount of retroactive seniority to be awarded to employees reinstated under a settlement.

**3. Union's Unsound Contentions of Miscellaneous Violations**

a. The union contends that substantive and procedural *due process* rights of its members have been violated by the courts below despite the district court's permission for the union to intervene and present its objections to the award of retroactive seniority or any provision of the settlement agreement. The

[12] Cf. The probability of the plaintiffs' success on the merits has traditionally been estimated by federal courts of equity in ruling on motions for preliminary injunction. See 11 Wright and Miller, *Federal Practice and Procedure*, § 2948, pp. 449-55.

[13] The district court record included depositions, answers to interrogatories, produced documents, and memoranda that had accumulated in support and opposition to the plaintiffs' motion for a summary judgment of violation of Title VII, as shown by the district court docket, *i.e.*, TWA answers to interrogatories (11-27-74), Faris deposition (2-27-75), Cromartie and Preston depositions (4-16-75), Owen affidavit (7-9-75), TWA's answers to interrogatories (9-10-75), Bergs deposition (8-11-75), TWA's answers to fifth set of interrogatories (9-10-75), Solow deposition (12-5-75), Crombie deposition (6-30-76).

union (pp. 35-37) relies mainly on *Davidson* v. *New Orleans*, 96 U. S. 97 (1877), which itself refutes the union's contention. There a property owner attacked a city's assessments to pay for the costs of drainage. A state statute provided that the property owner could contest the assessment in court. The Supreme Court held that, since a court objection was provided for, "the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law." After noting that the property owner had been given notice and appeared at a fair hearing, the court commented:

> "If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

The union here had the opportunity to appear and be heard.[14]

b. The *collective bargaining agreement* between TWA and the union is claimed (union br. p. 21) to be violated by the settlement agreement. The settlement agreement states that nothing contained in any other agreement, including labor agreements, shall be deemed to change or diminish the rights arising under the settlement (Pet. App. 80-951, 36a-37a). The collective bargaining agreement provides that seniority shall begin to accrue from the date of employment as a flight attendant and continue during the employment. II J. A. 91. The union's argument apparently is that the seniority order conflicts with this provision in stating that each reinstated employee "shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the 'compensation period' as defined in the settlement agreement." Pet. App. 80-951, 19(a). The compensation period, as thus defined, began with the class members' termination and ended on the date of signing the settle-

[14] In *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681 (1930), also cited by the union, due process was held to have been denied because the petitioner had been refused "an opportunity to present its case."

ment agreement on June 18, 1979. *id.* 24(a). It is arguable that the seniority order does not conflict with the collective agreement but *applies* it by providing for continuance of seniority for someone whose employment was unlawfully terminated. Or, if there is a conflict, since the allowance of seniority is valid under the reasoning of the *Franks* and *Teamsters* decisions as applied to the facts of this case, the seniority order prevails over any conflicting provisions of the collective agreement.

c. The union (pp. 31-2) makes a brief argument that *§ 703(h) of Title VII* prevents the award of retroactive seniority. The contention is that the seniority award treats the seniority system in the collective bargaining agreement as unlawful although under § 703(h) of Title VII it is not an unlawful employment practice to apply different standards of employment "pursuant to a bona fide seniority or merit system." The union cites statements about the effect of § 703(h) from the *Franks, Evans, Hardison* and *Teamsters* opinions cited above. The contention is inconsistent with the *Teamsters* holding. The Supreme Court, rejecting the Government's contention that the union violated Title VII because of the seniority system contained in the collective bargaining agreements, held § 703(h) granted immunity from a finding of illegality (431 U. S. 343, 355). Nevertheless, what the union does not point out, the Supreme Court held (pp. 363-71) two classes of plaintiffs entitled to retroactive seniority despite the union's lack of involvement in a violation and the existence of a "bona fide seniority system." So here the award of seniority is not contrary to § 703(h) even though the seniority system did not violate Title VII.

d. The union argues (pp. 32-5) that the award of retroactive seniority allows TWA to change the contractual seniority provisions of the collective bargaining agreement without complying with the procedures established under the *Railway Labor Act*, which applies to TWA under § 201 of the Act. 45 U. S. C. § 181. The union quotes § 2 of the act that a

carrier may not change rules or working conditions embodied in a collective agreement except as prescribed by the agreement or by statute. The argument is contrary to the holding in the *Teamsters* case (see above) that retroactive seniority could be awarded even though the seniority provisions of the collective agreement did not violate Title VII.[15]

**(4) Court Determination of Retroactive Seniority Recognized as Proper Procedure in This Litigation**

The factual background of this litigation, much of it not mentioned by the union or the AFL-CIO, supports the reasonableness of the district court's exercise of its authority to determine retroactive seniority.

The litigation over the rejected 1971 settlement indicated that retroactive seniority was a desirable and perhaps necessary provision in any later settlement agreement. While all terminated stewardesses were offered reinstatement by the 1971 agreement, it allowed them only the seniority they had on the date of termination (I J. A. 25a). The objectors to the settlement contended their seniority should be accrued to the date of reinstatement. The court of appeals noted that seniority has "a very important effect on stewardesses' trip assignments and the like" and that reinstated stewardesses under the settlement "would want seniority to accrue during the period they had been out of the job, but the greater seniority awarded to them, the larger the number of currently employed stewardesses who would be put to disadvantage." *ALSSA* v. *American*

[15] For its argument the union relies mainly on *Myers* v. *Gilman Paper Co.*, 544 F. 2d 837, 857 (5th Cir. 1977). However, as the union's brief overlooks, the cited decision was reconsidered on rehearing because of the later Supreme Court decisions in *Teamsters*, *Evans*, and *Hardison* cited above. See same title at 556 F. 2d 758, cert. dismissed under Rule 60. 434 U. S. 801. The opinion there said, "It is clear at least that the judgments of the district court and this court cannot stand on the theory this case has proceeded on to date." (p. 760).

*Airlines*, 490 F. 2d 636, 640 (1973) *cert. den.* 416 U. S. 993. The order approving the settlement was reversed because the union for current flight attendants, who also represented the terminated employees, was in a conflicting position because of the seniority issue.

When in 1977 American Airlines and its terminated flight attendants negotiated a settlement, the 1973 decision of the court of appeals made the parties realize the importance of providing retroactive seniority to the reinstated employees. As in the present TWA case, the American settlement provided that the court should decide the amount of retroactive seniority (see *ALSSA* v. *American Airlines*, 573 F. 2d 960 at 962); the district court granted the union's motion for leave to intervene; the union's only complaint at the hearing was the provision for full retroactive seniority (*id.*); the district court approved the settlement granting reinstated employees retroactive seniority from the time of termination; and the court of appeals affirmed. This Court denied certiorari in October 1978, 439 U. S. 876.

The success of the provision for district court determination of retroactive seniority in the *American* case over the union's objection, including the denial of certiorari in the Supreme Court, reemphasized the need for such a provision in June 1979 in the similar settlement negotiated in the companion TWA case, where each side was represented by the same attorneys as in the American case. After this Court deferred ruling on the certiorari petitions in No. 78-1545 and No. 78-1549 because of the settlement negotiations, the agreement was entered into in mid-June 1979 and the union was granted leave to intervene on July 19. The union was given full opportunity to present its objections in the district court (Hearing, II J. A. 26-83) and on appeal. It would be incongruous for the TWA settlement to be overturned because of its arrangement for court determination of retroactive seniority which had been encouraged in the decision overturning the 1971 settlement and expressly approved for the American settlement, in both cases with certiorari denied.

**B. Subject Matter Jurisdiction Not Lacking for Settlement Approval and Allowance of Seniority**

The union's second major contention is that the district court had no jurisdiction to approve the settlement or award seniority to the Subclass B plaintiffs (brief, Question 2, Point II). The argument is based on the court of appeals' holding in 582 F. 2d, which is before the Court in No. 78-1545, that the Subclass B plaintiffs had not complied with the relevant Title VII time limit that was held to be a jurisdictional prerequisite. The court of appeals opinion in 630 F. 2d, rejecting the union's contention (Pet. App. 80-951, pp. 5a-9a), stated first that a similar claim had been rejected in the related case of *ALSSA* v. *American Airlines*, 573 F. 2d 960, *cert. den.* 439 U. S. 876. The court noted that it was not material that the jurisdictional question had not been decided when the American settlement was approved, because in the TWA case the jurisdictional issue was pending on review in the Supreme Court, so that the uncertainty of the outcome was a factor leading to the settlement. The court of appeals concluded, "Where, as here, the jurisdictional question is not settled with finality, the parties should not be forced to litigate the issue of jurisdiction, if they can arrive at a settlement that is otherwise appropriate for district court approval" (*id.* p. 9a). These reasons and others fully support the court of appeals' holding.

The briefs of the plaintiff class members and of the EEOC as amicus argue the jurisdictional effect of the time limit as if they expect the Court to decide it in passing on the court of appeals decision on the settlement approval order. Plaintiffs' Brief, p. 38. EEOC Brief, p. 10. But both briefs also argue (plaintiffs, pp. 36-42, EEOC, p. 21) that the settlement order should be affirmed despite a holding that the time limit is jurisdictional. Thus both the plaintiffs and the EEOC concede that a decision on the jurisdictional nature of the time limit is unnecessary to an affirmance of the settlement approval and seniority orders. TWA advocates this position and urges the

Court to decide the issues in No. 80-951 without getting into the complex question of the nature of the Title VII time limit, which may also be avoided in No. 78-1545 (see pp. 48-49).

**1. District Court's Authority Not Invalidated by Court of Appeals Reversible Holding on Time Limit Noncompliance.**

As shown above (pp. 16-17), the district court's authority and jurisdiction to approve the settlement and award seniority are implied from the equitable jurisdiction over civil rights remedies in § 1343(4) of the Judicial Code and § 706(g) of Title VII. Recent examples of such authority are the *Teamsters, AT&T, American Airlines,* and *Moore* cases cited above.

In adjudicating the issues raised by a settlement, the district court considers the uncertainties of the litigation, the likelihood of the parties' victory or defeat, and the probable outcome of the litigation. In this case, at the time of the settlement it was uncertain whether the Subclass B plaintiffs would lose or win on the issue of time limit compliance because of the review pending in this Court. Lack of subject matter jurisdiction had not been completely adjudicated when the settlement was negotiated and approved and when seniority was granted to the reinstated plaintiffs under the district court's equitable powers. It may be that the plaintiff's noncompliance with the Title VII time limit would amount to laches in the equitable balancing of benefits under the settlement agreement and a seniority award. But the court of appeals' open holding on lack of jurisdiction did not deprive the district court of power to adjudicate under the rigid doctrine of subject matter jurisdiction invoked by the union.

The situation here is crucially different from that in *Insurance Group* v. *D & RGW Ry. Co.*, 329 U. S. 607, 612 (1947), which the union quotes for a statement that amounts to the doctrine of the law of the case, although the union does not use the phrase. It was a final ruling of this Court which the union's quotation refers to as the ruling "binding upon the district court

and the circuit court of appeals." In contrast, the court of appeals' decision here was under process of review in the Supreme Court at the time of the settlement.

Further, the law of the case doctrine is not applicable because the issue decided by the court of appeals was not the same as the issue before the district court. The union contends the law of the case to be the court of appeals' holding that the Subclass B plaintiffs had failed to comply with the jurisdictional prerequisite of compliance with the Title VII time limit. The jurisdictional question in the district court was whether it had authority to consider and approve a settlement and award seniority while the subject matter jurisdiction to prosecute the claims was uncertain during the review process pending in the Supreme Court.

The union's brief (pp. 48-50) contends that its jurisdictional argument is fully supported by *United Air Lines* v. *Evans*, 431 U. S. 553, 555-6 (1977). The union amplifies the possible ramifications of the statement in *Evans* that a "discriminatory act not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed" (p. 49). In *Evans* as in *McArthur* v. *Southern Airways*, 569 F. 2d 276, cited by the union and heavily relied on in the petition for certiorari as in conflict with the court of appeals decision here,[16] there was no uncertainty about the plaintiffs' non-compliance with the Title VII time limit.

The union also relies on *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973), and other cases for the holding that claims below the diversity jurisdictional amount may not be included in determining the class in a diversity class action. The issue is different in the settlement of a class action, as held in *Patterson* v. *Stovall*, 528 F. 2d 108, 112 n. 5 (7th Cir. 1976), which held a settlement including some class claims under $10,000 had jurisdictional support in other claims above the

[16] The *McArthur* case was overruled in the Fifth Circuit in *Coke* v. *General Adjustment Bureau*, 640 F. 2d 584, 592 (1981).

amount. Thus the principle of ancillary jurisdiction, urged by the dissent but rejected by the *Zahn* majority to determine class membership for prosecution of the litigation, was in effect held to permit the inclusion of non-jurisdictional claims in a settlement. Here that idea is applicable since the court of appeals held that Subclass A members had complied with the Title VII time limit (Pet. App. 80-951, pp. 54a-55a).

**2. Judicial Policy Favoring Settlements Outweighs Union's Strict Jurisdictional Arguments**

The union (pp. 39-41) cites many court decisions for the traditional results of lack of subject matter jurisdiction, as that it cannot be provided by stipulation, consent, waiver or conduct of the parties; that a challenge to the court's jurisdiction may be raised by anyone at any time; that a court is obliged *sua sponte* to inquire into its jurisdiction and dismiss the action if it lacks jurisdiction. However, in a contest between the two policies of settlement and jurisdiction as presented by the union's contentions, the settlement policy is the stronger and should prevail if settlements are to continue to be an effective means of terminating litigation.

Even if subject matter jurisdiction is considered an absolute essential that must be given full though formalistic effect, it will be fully satisfied here when the settlement approval order is affirmed. The court of appeals non-final decision of lack of jurisdiction will then become moot and of no effect under the terms of the settlement agreement itself (Pet. App. 80-951 25a, 35a) and under this Court's usual procedure when litigation is settled after certiorari has been filed or granted. The judgment of the court of appeals will then be vacated and the case remanded to the district court to dismiss the appeal as moot. *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U. S. 115 (1959), *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). Thus, as a result of this Court's approval of the settlement order, the court of appeals decision of lack of subject matter jurisdiction will not be an existing adjudication.

The union's jurisdictional contention means that a settlement is not valid and could not be carried out until the subject matter jurisdiction over all settled claims has been finally decided by the court of last resort. Such a result would be very impractical for courts of limited jurisdiction like the federal courts. The legal materials on settlements, with the process often extra-judicial, are relatively sparse in comparison with the large bulk of litigation that is disposed of by settlement.[17] But it is clear here that the practical settlement policy outweighs the rigid jurisdictional policy as the union would have it applied.

The jurisdictional policy is not as strong as the union contends. The courts long ago modified the strict rule that a judgment is absolutely void if the court lacked subject matter jurisdiction. For practical reasons, courts have sustained such a judgment in the interest of the finality of court decisions. *Stoll* v. *Gottlieb,* 305 U. S. 165 (1938); *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371 (1940). See *Restatement of the Law, Second, Judgments,* Tentative Draft No. 6 (1979) 149-153. It would be inconsistent with the purposes of Title VII and the strong judicial policy favoring settlements for the courts to hold that a disputed compliance with Title VII filing requirements cannot be settled because of their judisdictional nature. The dispute over compliance would prevent the settlement of extensive litigation that might take years to resolve otherwise. The judicial policy requiring subject-matter jurisdiction is intended to reduce the burden of litigation as is the judicial policy favoring the settlement of disputes. Here the two policies have the same objective and do not conflict. The settlement policy controls and refutes the union's contention that the settlement is invalid.

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[17] See Julius M. Title, Judge of Superior Court of Los Angeles, *The Lawyer's Role in Settlement Conferences,* 67 A.B.A. Jour. 592 (May, 1981): "The settling of cases before trial offers the greatest potential for assisting courts in reducing their ever-growing case loads."

## II.

## SUBCLASS B CLAIMS RIGHTLY EXCLUDED FOR NON-COMPLIANCE WITH TITLE VII TIME LIMIT*

(Docket No. 78-1545)

The plaintiffs and the EEOC seek a reversal in No. 78-1545 of the court of appeals' decision that the relevant Title VII time limit was a jurisdictional requirement, precluding a finding of waiver or estoppel and resulting in the exclusion of the claims of the Subclass B plaintiffs (Pet. App. 80-951, 55a-58a). Opinions of this Court have stated clearly that Title VII time limits are jurisdictional requirements:

> *McDonnell-Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973): "Respondent satisfied the *jurisdictional prerequisites* to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory Notice-of Right-to-Sue."
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> *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47 (1974): Title VII "specifies with precision the *jurisdictional prerequisites* that an individual must satisfy before he is entitled to institute a lawsuit," referring to the filing of a "timely charge" with the EEOC and acting on the EEOC Notice of Right-to-Sue.
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> *Electrical Workers* v. *Robbins & Myers*, 429 U. S. 229, 239-40, 50 L. Ed 2d 427, 437 (1976); "In defining Title VII's *jurisdictional prerequisites* 'with precision' [citing *Alexander*], Congress did not leave to courts the decision as to which delays might or might not be 'slight' ".
>
> *United Air Lines* v. *Evans*, 431 U. S. 553, 555, 52 L. Ed. 2d 571, 576-8 (1977): "Timely filing is a *prerequisite* to the maintenance of a Title VII action" [citing *Alexander* and *Electrical Workers*] Footnote 4. "The District Court . . . dismissed the complaint on the ground that it had no *jurisdiction of a time-based claim.* "Respondent cannot rely for *jurisdiction* on the single act of

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* Point II will not be reached if the settlement approval order is affirmed in No. 80-951. See first and second alternatives, above p. 6.

failing to assign her seniority credit for her prior service at the time she was rehired." Footnote 9.

Panels of courts of appeals in the Seventh Circuit, perhaps earlier and more consistently than in other circuits, have so stated and held. The many Seventh Circuit cases have included *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359 (1968); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811, 821 n26 (opinion by Judge Stevens, 1972); *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806, 807 (1975); and *Davis* v. *Weidner*, 596 F. 2d 726, 728-9 (1979), in addition to the case under review in this Court's Docket No. 78-1545.

Courts of appeals in other circuits have often so stated and held, as in:

*Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 241 (3d Cir. 1975), *cert. denied*, 421 U. S. 1011 (1975): "the timely filing requirements with respect to EEOC appears to be a *jurisdictional prerequisite* to court action under Title VII."

*Hamilton* v. *General Motors Corp.*, 606 F. 2d 576, 579 (5th Cir. 1979), *cert. denied*, 447 U. S. 907 (1980): "A *jurisdictional prerequisite* to a Title VII action is the timely filing of a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC complaint must be filed within 180 days of the alleged discriminatory act."

*Brown* v. *Mead Corp.*, ____ F. 2d ____, 25 EPD ¶ 31,730 (6th Cir. 1981): "Title VII filing requirements are *jurisdictional.*"

*Local 179, United Textile Workers* v. *Federal Paper Stock Co.*, 461 F. 2d 849, 851 (8th Cir. 1972): "A complaining party must satisfy two *jurisdictional prerequisites* in order to bring suit under Title VII: (a) a charge must be filed with the EEOC, (b) statutory notice from the EEOC of the right to sue must be received."

*Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1231 (8th Cir. 1975): After discussing the District Court's holding, the Court affirmed, "The filing of a charge with

the EEOC within the time limits of § 2000e-5(e) is a *jurisdictional prerequisite* to commencement of a court action."

*Hinton* v. *CPC International, Inc.*, 520 F. 2d 1312, 1315-6 (8th Cir. 1975): On the 90-day time limit for filing a District Court action, "Plaintiff's failure to initiate his action . . . within the *jurisdictional* 90-day period deprives the federal court of *subject matter jurisdiction.*"

*Orahood* v. *Board of Trustees, University of Arkansas*, ____ F. 2d ____, 25 EPD ¶ 31,715 (8th Cir. 1981): The opinion stated that because the EEOC charge was filed more than 180 days after the discriminatory act the district court "was without *jurisdiction* to afford the plaintiff relief."

*Wong* v. *Bon Marche*, 508 F. 2d 1249, 1250-1 (9th Cir. 1975): After stating that the 90-day period in which to commence a federal action could not be "forgiven or extended" the opinion stated, "the *requirement* for filing a complaint within the 90-day period was *jurisdictional.*"

*Verzosa* v. *Merrill Lynch, Pierce, Fenner & Smith*, 589 F. 2d 974, 976 (9th Cir. 1978): "A Title VII complainant must file charges with the EEOC within 180 days of the alleged act of discrimination; failure to do so deprives the district court of *jurisdiction.*"

District court opinions stating and applying the jurisdiction idea are too numerous to cite. A recent example is seen in *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980), which, reversing a court of appeals decision, sustained a summary judgment of the Northern District of New York that the employee's failure to file a timely EEOC charge had deprived it of subject matter jurisdiction.

The plaintiffs and the EEOC urge adoption of the view stated in other opinions of courts of appeals and district courts (EEOC brief, pp. 10-18, n8 and n14) that the Title VII time limits are not jurisdictional. The EEOC repeatedly states (pp. 10, 11, 13, 18) that the time limit for filing the EEOC charge "*is an ordinary statute of limitations.*" This term has not been used in the opinions cited by the EEOC, although some have said

that the Title VII time limit is *like* a statute of limitations,[18] or that the requirement has been *analogized* to a statute of limitations,[19] or is the *administrative equivalent* of a statute of limitations.[20] The grounds or standard to be used in not applying the time limit have been described in these cases as waiver and estoppel,[21] equitable modification[22] or tolling.[23]

Much of the discussion of the nature of the Title VII time limit in court opinions, as in lawyers' briefs, has tended to be on the level of nomenclature. Prior opinions, including those of this Court, have been quoted for the use of the words "jurisdiction", or "statute of limitations," or even "limitations" as a significant indication of the nature of the time limit. Some opinions, while warning against giving weight to the words used, seem to make the conclusion depend on a count of labels in earlier opinions and in Congressional reports and debates. Justice Holmes, speaking of the time limit in the Federal Employees' Liability Act, warned against this practice: "we are not to be curious in nomenclature if Congress has made its will plain, . . ." *Atlantic Coastline R. Co.* v. *Burnette*, 239 U. S. 199, 201 (1915).

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[18] *Coke* v. *General Adjustment Bureau, Inc.*, 640 F. 2d 584, 591 (5th Cir. 1981), *Hart* v. *J. T. Baker Chemical Corp.*, 598 F. 2d 829, 832-3 (3rd Cir. 1979), *Oaxaca* v. *Roscoe*, 641 F. 2d 386, 391 (5th Cir. 1981)

[19] *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 927-8 (5th Cir. 1975), *Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429, 474 (D. C. Cir. 1976), *Reynolds* v. *Sheet Metal Workers*, ____ F. 2d ____, 25 EPD (CCH) ¶ 31,706 (D. C. Circ. 1981).

[20] *Cooper* v. *Bell*, 628 F. 2d 1208, 1212-1214 (9th Cir. 1980)

[21] *Reeb* (above, n. 19).

[22] *Hart, Cooper* (above, n. 18, 20)

[23] *Coke* (above, n. 18); *Malone* v. *North American Rockwell Corp.*, 457 F. 2d 779, 781 (9th Cir. 1972); *Leake* v. *University of Cincinnati*, 605 F. 2d 255, 259 (6th Cir. 1979); *Stebbins* v. *Nationwide Mutual Ins. Co.*, 469 F. 2d 268, 269 (4th Cir. 1972). Tolling has been allowed when the employee was unaware of the facts that would support a charge of discrimination. *Reeb* (above, n. 19); *Oaxaca* (above, n. 18).

A third alternative, not as strict as a jurisdictional requirement and not as loose as an "ordinary" statute of limitations, is that the time limit is a prerequisite or condition precedent of the Title VII claim for relief, the plaintiffs' cause of action. The briefs of the plaintiffs, the union, the EEOC, and the AFL-CIO do not discuss this third alternative. We set forth (Point II A) the reasons why this third alternative, compared with an "ordinary statute of limitations", is more compatible with the congressional plan of Title VII and more appropriate procedurally in balancing the opposing interests in Title VII litigation.

**A. Time Limit a Prerequisite of Claim for Relief**

To hold compliance with the time limit to be a prerequisite condition precedent to the claim for relief is consistent with the use of the term "prerequisite" by this Court and many other courts and as applied in court holdings. A very recent decision, *Coke* v. *General Adjustment Bureau, Inc.*, 640 F. 2d 584, 595 (5th Cir. March 1981), much relied on in the briefs of plaintiffs and the EEOC for its very comprehensive review of Title VII time limit decisions and its rejection of the idea that the time limit is jurisdictional, concluded that the time limit for filing EEOC charges "is a pre-condition to filing suit in district court, but is not related to the subject matter jurisdiction of the court." Other cases:

> *Forts* v. *Ward*, 621 F. 2d 1210, 1215 (2d Cir. 1980). "As a general rule, the filing of a timely charge with the Equal Employment Opportunity Commission (EEOC) is a *prerequisite* to the maintenance of a Title VII action in the District Court."
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> *Roberts* v. *North American Rockwell Corp.*, ____ F. 2d ____, 26 EPD ¶ 31,885 (6th Cir. 1981): "Timely filing of a charge with the EEOC and ... a complaint in federal district court is a *prerequisite* to maintenance of a Title VII action."
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> *Doski* v. *M. Goldseker Co.*, 539 F. 2d 1326, 1329 (4th Cir. 1976: "It is settled that before an aggrieved person

may file suit in the district court under Title VII he *must first have timely filed* a charge of discrimination with EEOC."

*Jewett* v. *International Telephone and Telegraph Corp.*, ____ F. 2d ____, 26 EPD ¶ 31,888 (3d Cir. 1981): "Timely filing is a *prerequisite* to the maintenance of a Title VII action."

*Greene* v. *Carter Carburetor Co.*, 532 F. 2d 125, 126 (8th Cir. 1976): "The timely filing of a charge of discrimination with the EEOC is a *prerequisite* to court action under Title VII."

*Collins* v. *United Air Lines, Inc.*, 514 F. 2d 594, 596 (9th Cir. 1975): After discussing the 90-day period established in § 706(d), "The satisfaction of this statutory requirement is a *necessary prerequisite* to commencement of a court action under the statute."

*Inda* v. *United Air Lines, Inc.*, 565 F. 2d 554, 559 (9th Cir. 1977) *cert. denied* 435 U. S. 1007 (1978): The opinion stated that a named plaintiff, suing on behalf of a class, "must have *secured a right* to sue by timely following the procedures set forth in Title VII."

**1. Statutory Provisions**

The new remedies granted in § 706 of Title VII to a person claiming employment discrimination in violation of § 703[24] indicate that the filing of a charge with the EEOC and other requirements are necessary before beginning an action in the district court. Paragraph (a) of § 706 directs the commission to notify the employer and investigate whenever a person claiming to be aggrieved charges that his employer has engaged in unlawful employment practices under § 703. The original act, as it existed when this action was begun in 1970, provided in paragraph (d) of § 706 that a charge under paragraph (a) "shall be filed within 90 days after the alleged unlawful employment practice occurred." § 706(d) provided different

[24] Relevant provisions of §§ 703 and 706 of Title VII are copied in the appendix to this brief, pp. 1a-6a.

unlawful employment practices under § 703. The original act, as it existed when this action was begun in 1970, provided in paragraph (d) of § 706 that a charge under paragraph (a) "shall be filed within 90 days after the alleged unlawful employment practice occurred." § 706(d) provided different time limits if a preliminary state proceeding was required by paragraph (b). Paragraph (e) then required the EEOC to attempt to conciliate the dispute and, if unable to obtain voluntary compliance, to notify the person aggrieved. Then, paragraph (e) provided, "a civil action may, within 30 days thereafter, be brought against the respondent named in the charge." Paragraph (f) referred to an action brought under the preceding paragraph (e) after compliance with the requirements for filing a charge under the preceding paragraphs (a) and (d).

The sequence of these provisions alone indicates that compliance with the requirements for state and EEOC proceedings are a part of the affirmative case of the aggrieved person to be performed, pleaded, and proved by him to establish the claim. Congress obviously imposed the unusually short time limits and the prior screenings of claims by the EEOC and state agencies in order to limit access to the federal courts to diligent claimants with meritorious claims that could not readily be disposed of otherwise. It is not reasonable to infer that Congress intended the time limits for these preliminary requirements to be "ordinary statutes of limitations", which are not shown by plaintiffs or the EEOC to contain anything resembling these prerequisites.

Plaintiffs (pp. 27-8) and the EEOC (p. 14) contend that the time limit in Title VII is an ordinary statute of limitations because it was patterned after the National Labor Relations Act in which the time limit for filing a charge has been so held. But there was no time limit in the NLRA when it was enacted in 1935. It was the Taft-Hartley Act in 1947 that first provided that the board should not issue a complaint on any unfair labor

practice occurring more than six months before filing the charge. See *NLRB* v. *Local 264,* 529 F. 2d 778, 782-3 (8th Cir. 1976). This was not a condition precedent since the original act provided for the remedy without the time limit. The NLRA does not contain any preliminary requirements like the state and EEOC proceedings without which Title VII could not have been enacted. See quotation (below, p. 38) from *Mohasco* opinion, 65 L. Ed. 2d at 545. The NLRA is not a good analogy.

**2. Legislative History**

The legislative history shows that the time limit for filing the charge with the EEOC and the other time limits in § 706 are not "ordinary statutes of limitations." The original bill that later became Title VII in 1964 provided a six-month period after an unlawful practice for filing the charge with the EEOC although a one-year provision had been included in otherwise identical language in a 1962 bill in the House (EEOC, *Legislative History of Title VII and XI of the Civil Rights Act of 1964,* pp. 2012, 2167). A later so-called 'leadership compromise' between Senators Dirksen and Mansfield, which took away the EEOC's power to file suit, reduced the time limit from six months to the final provision of 90 days for the employee's EEOC charge and 30 days for the district court action (*Id.* 3018).

This Court's recent decision in *Mohasco Corp.* v. *Silver,* 447 U. S. 807, 65 L. Ed. 2d 532 (1980), involving the Title VII time limit following a state proceeding required by the act, explains legislative history which refutes any inference that these time limits are only "ordinary statutes of limitations."[25] This Court

[25] The EEOC brief (p. 16, n4) says that the Court noted in *Mohasco* that the defendant had not asserted as a defense the plaintiff's failure to file his action within 90 days after receipt of the "right-to-sue" letter from the EEOC (opinion, 65 L. Ed 2d 539, n9). The EEOC adds, "and therefore [the Court] treated it as a waiver." The Court noted the action was filed on the 91st day but said nothing about waiver. There was no occasion to do so because the plaintiff was held to have been guilty of the more substantial late filing of his EEOC charge by 57 days.

there reversed the decision of the court of appeals for the Second Circuit (Judge Meskill dissenting), which had reversed the district court's summary judgment that the employee's failure to file the timely charge had deprived it of subject matter jurisdiction. The account of the legislative history and its effect is significant:

> "On February 10, 1964 the House of Representatives passed HR 7152, its version of the comprehensive Civil Rights Act. Title VII of that bill contained a six-month limitation provision for the filing of charges with the EEOC . . . In the Senate, HR 7152 met with exceptionally strong opposition. . . . During the course of one of the longest filibusters in the history of the Senate, the bipartisan leadership of the Senate carefully forged the compromise substitute (Dirksen compromise) that was ultimately to become in substantial part the Civil Rights Act of 1964. . . . (p. 544)
>
> "Section 706(d) of the compromise provided for a 90-day limitations period for filing discrimination claims with the EEOC . . . It was the first time the 90-day figure appeared in any proposed bill, and its appearance was unaccompanied by any explanation. . . .
>
> "Since the Senate did not explain why it adopted a time limitation of only half that adopted by the House, one can only speculate. But it seems clear that the 90-day provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination. To others it must have represented a necessary sacrifice of the rights of some victims of discrimination in order that a civil rights bill could be enacted." (p. 545)
>
> "By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination . . . We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the

balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction." (p. 548)

It is a reasonable inference that the provisions of § 706 for exhausting state remedies and for filing the charge with the EEOC to obtain EEOC conciliation were intended to be essential preconditions of the claimant's right to file the action in the district court. Congress did not know in 1964 how many actions were likely to be filed in the federal courts. The multitude of actions that have been filed, beginning gradually in the years after the enactment of the statute, was anticipated by the Congressional plan to give some protection to the courts by requiring the preliminary resort to state remedies and the filing with the EEOC. These preliminary requirements are more extensive and strict than anything in "ordinary" statutes of limitation, which provide only for the time of filing common law claims. The legislative history, indicating the unusual importance of the preliminary proceedings in Congress when the Civil Rights Act would not have been passed without them, supports a holding that the Title VII time limits are jurisdictional requirements if time limits ever have that effect. And certainly, if not jurisdictional, they are prerequisite conditions precedent.

The briefs of the plaintiffs and the EEOC, in arguing for easy modification of Title VII time limits, discuss only the negligent claimant's loss of a meritorious statutory right and do not consider this Court's many pronouncements that time limits for commencing litigation have the practical objective of protecting courts as well as defendants from the burden of stale claims. Time limits are "practical and pragmatic devices to spare the courts from litigation of stale claims" and the defendant "from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost."[26] As a result of these traditional objectives, the mere

[26] *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945). See also *Kavanagh* v. *Noble*, 332 U. S. 535, 539 (1947): Statutory time limits are imposed by the legislature "to cut off rights,

(*Footnote continued on following page.*)

enactment of the unusually brief time limits in Title VII is evidence of a strong congressional purpose to restrict Title VII remedies. The legislative history discussed above indicates such a purpose. The time limits, progressively more restrictive with changing versions of the legislation, emphasize that Congress intended to draw a firm line that would permit only the diligent claimant to recover.[27]

### 3. Procedural Differences

The procedural differences among time limits that are "ordinary statutes of limitations," condition precedents, or jurisdictional requirements are significant because the courts have weighed the procedural consequences in deciding the nature of a time limit.

If the time limit is an *ordinary statute of limitations*, the plaintiff is not required to plead compliance with it. The *defendant* must plead non-compliance under the specific requirement of Rule 8(c) of the Federal Rules of Civil Procedure.[28] A "statute of limitations" is one of many in a list of matters that a party "shall set forth affirmatively" in

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*(Footnote continued from preceding page.)*

justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary." In *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428 (1965), the Court cited an English statute of the year 1540 for the statement, "the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights" Cf. *United States* v. *Marion*, 404 U. S. 307, 322 n. 14 (1971).

[27] The 1972 amendments to the 1964 Act extended the time limit for filing the EEOC charge from 90 to 180 days and for the court action after the EEOC notice from 30 to 90 days. But even the new limits, not applicable to the present cases, remain relatively short. The Congressional discussion of the 1972 amendments indicates a serious concern about the congestion of cases in the EEOC as well as in the federal courts. Legislative History of Equal Employment Opportunity Act of 1972, Senate Committee on Labor and Public Welfare (pp. 63, 1505-16, 1528-32).

[28] Relevant provisions of Rules 8, 9, and 12 are copied in the appendix to this brief, pp. 6a-8a.

pleading to a proceeding pleading. The burden is then on the defendant to prove the facts of non-compliance. Issues of fact are decided at the trial, if not avoidable by a motion for summary judgment. Under Rule 8(d), the allegations not denied under Rule 8(c) "are admitted when not denied by the responsive pleading." These procedural results of an ordinary limitations statute would be inconsistent with the provisions by Congress for the unusual prerequisites of the EEOC and state proceedings for a district court action.

If the time limit is *jurisdictional,* the *plaintiff* must plead and prove compliance with it. It need not be pleaded as a defense. Rule 12(b) includes "lack of jurisdiction over the subject matter" as the first item in a list of defenses that "may at the option of the pleader be made by motion" as well as by the answer. Under Rule 12(h) entitled "Waiver or Preservation of Certain Defenses," paragraph (3) states that the court shall dismiss the action "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." This provision, as well as principles of subject matter jurisdiction applied by the courts, permit non-compliance with a jurisdictional time limit to be raised by any party or the court at any stage of the litigation, even at a hearing in the court of last resort. The harshness of this result has led some courts to decide that the Title VII time limits are not prerequisites of subject matter jurisdiction. See cases cited, EEOC brief, p. 10, n. 8.

If the time limit is a *condition precedent* to the plaintiff's claim for relief, compliance must be pleaded affirmatively by the *plaintiff* in order to state a claim upon which relief can be granted. A complaint failing to make the allegation is subject to a motion to dismiss under Rule 12(b) that a defendant's motion can make a defense of "failure to state a claim upon which relief can be granted." Such a defense is also included in the provision of Rule 12(h)(2) that it may be made "by motion for judgment on the pleadings, or at the trial on the

merits." The plaintiff's allegation of compliance can be made generally under Rule 9(c), entitled "Conditions Precedent." The rule provides, "it is sufficient to aver generally that all conditions precedent have been performed or have occurred." For the defendant's pleading, the rule states, "a denial of performance or occurrence shall be made specifically and with particularity."[29]

Illustrative of a condition precedent is *Glus* v. *Brooklyn Eastern Terminal,* 359 U. S. 231, 235 (1959), which disagreed with several earlier FELA cases and permitted non-compliance with the FELA time limit to be excused by estoppel because the defendant had induced the plaintiff's delay. But the plaintiff was required to plead and prove how he was misled by the defendant.

The plaintiffs and the EEOC argue that the time limit should be held not jurisdictional so that it can be modified under principles of waiver, estoppel, and equity. Because these principles "serve the ends of substantial justice," the EEOC argues, "they are presumed to be compatible with legislative intent, absent clear evidence to the contrary" (EEOC brief, p. 12 n9). Such an argument was recently rejected as short-sighted by this Court's statement that even if "the interests of justice might be served in this particular case" by a suggested construction of the Title VII time limit, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even-handed administration of the law." *Mohasco,* 65 L Ed 2d at 548. Further, modification of Title VII time limits under vague principles of law urged by the plaintiffs and the EEOC

[29] *EEOC* v. *Wah Chang Albany Corp.,* 499 F. 2d 187, 190 (9th Cir. 1974), said of preliminary requirements of § 706(f)(1) and (3) under the 1972 amendments of Title VII. "the procedural steps that must be taken before suit may be prosecuted are most reasonably considered conditions precedent." The court held that performance of the conditions could be pleaded generally as permitted by Rule 9(c).

would involve the courts in extensive factual disputes over the varied excuses plaintiffs could contrive to explain their negligence.

**B. Waiver and Estoppel Arguments Too Weak to Affect Decision.**

The facts about waiver, estoppel, or equitable modification which plaintiffs and the EEOC contend should be the basis for deciding the nature of the Title VII time limit are not mentioned in their briefs. What has mainly created the plaintiffs' "Question Presented" in their petition and brief, and then the grant of certiorari, are the remarks in the court of appeals opinion that it need not reach questions of waiver and estoppel because it is precluded by "our conclusion that this filing requirement was jurisdictional." (Pet. App. 80-951, 55a, 57a). In the briefs the complex arguments about the nature of the time limit have obscured the simple background facts.

There is no doubt that the plaintiffs in Subclass B failed to comply with the requirement of § 706(d) that a written EEOC charge "shall be filed within ninety days after the alleged unlawful employment practice occurred." The one EEOC charge for all class plaintiffs was filed on June 1, 1970 (complaint, I J.A. 7a). 386 of the plaintiffs were terminated during 1965-70 before March 1, 1970, the beginning of the ninety-day period (compiled from I J.A. 111a-122a).* One of the attorneys for the union who filed the action, testifying at the March 1972 hearing on the 1971 settlement, said that 95 percent of those terminated from 1965 on "had never said boo", i.e., "They had never made any protest to the Union or, as far as I know, to anybody else about their discharges" (*Id. 47a and see also 48a-49a).*

* The cited exhibit sets forth the "last day worked" of those terminated for pregnancy, the annual figures being 30 (after 7-2-65), 76 ('66), 78 ('67), 112 ('68), 88 ('69), 2 (before 3-1-70). The time limit began at least on the last day worked under the *Electrical Workers* (429 U. S. 229) holding (the date the employee was "fired" and "stopped work" and under the holdings of this Court and even the reversed court of appeals in *Delaware State College* v. *Ricks*, ___ U. S. ___, 66 L. 3d 2d 431 (1981).

The failure of the Subclass B plaintiffs to comply with the time limit was an incurable defect in their claims when the action was filed. The plaintiffs' waiver and estoppel contentions have not tried to excuse the plaintiffs for their failure to comply. Instead, the plaintiffs' arguments have been, as described in the court of appeals' opinion, that TWA "waived this limitations defense by failing to plead it affirmatively in its answer" (Pet. App. 80-951, 55a); that its "statements at a March 17, 1972 settlement hearing constitute an express waiver of the filing requirement issue"; and that it should be estopped from raising the requirement because it "failed to raise it during the many lengthy proceedings which preceded the . . . motion to amend its answer to raise the issue" and so "played fast and loose with the courts" (*id.* 57a). The court of appeals, though indicating doubts about these contentions,[30] brushed them aside as not requiring consideration because of the jurisdictional nature of the time limit.

***An analysis of the facts, as they clearly appear in the record, completely refutes these waiver and estoppel arguments.***

1. The plaintiffs' major waiver contention has been that TWA's answer, filed September 30, 1970, waived the Subclass B plaintiffs' non-compliance with the time limit for filing EEOC charges by failing to allege it as an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. It is true that the time limit was not included in paragraphs 12 and 13 of TWA's answer, which were labeled "First Affirmative Defense" and "Second Affirmative Defense." 1 J. A. 12a. But the plaintiffs' waiver contentions overlook, among other things, the fact that TWA clearly raised the time limit issue in the

[30] The opinion at the pages noted said it was questionable that a concession at a settlement hearing should be held a waiver when the settlement was later overturned and, describing decisions relied on by the plaintiffs, said they did not support the estoppel argument.

preceding paragraph 11 of its answer. Paragraph 11 of the answer alleged that TWA is

> "without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 [of the complaint] that on or about June 1, 1970, plaintiff union filed a charge with the EEOC alleging unfair employment practices, and that the EEOC notified plaintiff union on June 31, 1970 that it was entitled to initiate a civil action in a United States District Court." 1 J. A. 11a-12a.

This allegation under Rule 8(b) of the Federal Rules of Civil Procedure "has the effect of a denial." The answer in 1970 thus raised the issue of whether the plaintiffs had complied with the time limit for filing a charge with the EEOC.

The plaintiffs' allegations of the time of filing the charge and TWA's denial were appropriate pleading under such decisions as *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359 (7th Cir. 1968), that compliance with the time limit was a "jurisdictional precondition to the commencement of a court action." That case was decided two years before the present action was filed. Similarly the plaintiffs' and TWA's pleadings were appropriate if the filing of the EEOC charge was a nonjurisdictional condition precedent.

However, plaintiffs' counsel later contended, on the appeal from the order approving the 1971 settlement, that non-compliance with the time limit had to be pleaded by the defendant as an affirmative defense under Rule 8(c). Appellant's Reply Brief, Court of Appeals, No. 72-1335 etc., page 28. After the court of appeals overturned the 1971 settlement and this Court denied certiorari, the case did not get back in the district court until May 1974, when it was assigned to a new judge. At the first status call of the case in September 1974, TWA moved, and was later permitted, to amend the answer by a "third affirmative defense" which pleaded non-compliance with time limit (1 J. A. 89a, 98a). This was done out of an abundance of caution in view of the contention of plaintiffs' counsel.

Thus the complex legal controversy over the nature of the Title VII time limit is in this case largely based on whether plaintiffs' non-compliance was properly pleaded by TWA's denial of plaintiffs' allegation of compliance instead of, as plaintiffs contend, by an affirmative statement of defense. If the time limit was not an "ordinary statute of limitations" when the answer was filed, it is not within the requirement of an affirmative defense in Rule 8(c). But, even if within Rule 8(c), when the defense appears on the face of the complaint, it need not be specifically pleaded in the answer. Cf. *Pierce* v. *County of Oakland*, ____ F. 2d ____, 26 EPD 21,149 (6th Cir. July, 1981). To hold otherwise, "would be reminiscent of the days of common law pleading" (*id.*). Here the answer denied plaintiffs' allegation of compliance. They and their counsel could not have been misled that TWA did not dispute their allegation.

2. The other weak waiver contention of the plaintiffs is that compliance with the time limit was waived by TWA's counsel at a March 1972 hearing on the approval of the 1971 settlement, later overturned on appeal. TWA's counsel, Joseph Carr, was discussing the terms of the settlement in concluding arguments. He explained that many of the plaintiffs had "slept for five or six years on their rights, without ever doing anything about them"; that it was questionable whether 90 percent of them had a right to go back to work; but that "we have agreed" (i.e., in the settlement) that all of them "may go back to work." The judge then asked, "In other words, you are waiving any question of statute of limitations?" Mr. Carr stated, "That is correct." (I J. A. 52A). Here TWA's counsel was merely stating what had been agreed to in the settlement. There was no intention to say, nor was the statement subject to any reasonable implication, that TWA was giving up its contention, apart from the settlement, that 90 percent of the plaintiffs had not complied with the time limit.

The plaintiffs' effort to make this explanation of the settlement a waiver of time limit compliance is contrary to Rule 408 of the Federal Rules of Evidence, which expressly states, "Evidence of conduct or statements made in compromise negotiations is . . . not admissable." Every lawyer knows that what he says in negotiating a settlement or in explaining it may not be used later as an admission. Any statement about the time limit was a "hypothetical or provisional concession conditioned upon the settlement's completion." Cf. *Hiram Ricker & Sons* v. *Students Intern. Soc.*, 501 F. 2d 550, 553 (1st Cir. 1974).

3. More complex, but equally lacking in substance, has been plaintiffs' contention that TWA concealed its intention to raise the time limit in an elaborate scheme to mislead the plaintiffs and the courts. They have argued that TWA intentionally failed to plead the Title VII time limit as an affirmative defense in its answer; that the plaintiffs were thereby misled to appeal from the 1971 settlement approval when they were unaware of the time limit or believed it had been waived; that then, when the proceeding was returned for trial after the settlement was overturned on appeal, TWA raised the time limit issue to assert lack of subject matter jurisdiction; and that TWA thereby mislead the plaintiffs and "played fast and loose with the courts." The record readily destroys this fantasy.

The record shows plaintiffs' present counsel, who were present and objecting to the 1971 settlement at the hearing in March 1972, knew full well, before the settlement was approved and before they appealed from the approval order, that the time limit would be raised to bar any recovery if the settlement was overturned. Their knowledge is shown, *first,* by the extensive discussion of non-compliance with the time limit as a reason for the settlement (I.J.A. 47a-53a). *Second,* on March 20, 1972, three days after entry of the order approving the settlement, there was an express warning that the time limit might prevent any recovery if the settlement order were re-

versed on appeal. This warning, contained in a report[31] by union counsel to all class members on the court's approval of the settlement, stated that a victory on the merits could be "illusory" because the claims might be defeated entirely by the time limit. The report concluded with a "hope" that there would be no appeal. Despite this express warning on March 20 that the appeal might destroy any recovery through the bar of the time limit, plaintiffs' present counsel filed the appeal on April 11 (District Court Docket No. 70-2071).

Further, plaintiffs' estoppel argument overlooks its only possible and limited effect. Even if defendant were estopped because it had misled the plaintiffs, inducing them to object to the settlement in the district court and to appeal from the approval order, they would recover only what the settlement would have given them if it had not been set aside. They would not have become class members who had complied with the time limit for claims under Title VII.

* * *

The foregoing discussion of plaintiffs' arguments of waiver and estoppel shows how they are readily refuted by record facts. The arguments seem to be too weak to provide an appropriate occasion for this Court to decide the nature of the Title VII time limit. But even if the time limit is held to be only an "ordinary statute of limitations", the arguments are too weak to change the court of appeals' exclusion of the claims of the Subclass B plaintiffs. Plaintiffs' stated basis of the argu-

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[31] I J. A. 57a. The report included the following paragraph:

"Time limits are contained in the Civil Rights Act requiring that a charge 'shall be filed within ninety days after the alleged unlawful employment practice occurred.' Since an estimated 90 percent of the members of the pregnancy class had been terminated long before ALSSA filed a charge in 1970 at the request of some members of the class who had then just been terminated, the claims of practically the entire class might be held to be untimely and barred in their entirety."

ments vanishes if the time limit is held to be more than a statute of limitations. For, as a jurisdictional or nonjurisdictional prerequisite, the time limit compliance had to be pleaded by the plaintiffs. TWA's not pleading it affirmatively did not waive noncompliance and was not an element of estoppel against TWA's contention of noncompliance even under plaintiffs' arguments.

## CONCLUSION

TWA urges the Court to adopt the first or second alternatives described above (p. 6) and affirm the settlement approval order in No. 80-951. If the settlement approval order is reversed and the Court reaches No. 78-1545 as stated in the third alternative, TWA urges the Court to affirm the court of appeals time limit decision either because the time limit is jurisdictional or because, as condition precedent or an "ordinary statute of limitations", its application is not affected by the plaintiffs' waiver or estoppel arguments.

Respectfully submitted,

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# APPENDIX

## A. EXCERPTS FROM TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY, CIVIL RIGHTS ACT OF 1964.

**Public Law 88-352, 78 Stat. 253, ff.; 42 U. S. C. § 2000e et seq.**
*(1972 Amendment Not Included)*

### Discrimination Because of Race, Color, Religion, Sex, or National Origin

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

* * *

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of

his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular [256] business or enterprise, . . .

**Prevention of Unlawful Employment Practices**

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice

or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and [260] twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or [260] local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be

filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggreived and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such [261] an action may be brought in any judicial district in

the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible [261] for the unlawful employment practice).* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

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* The 1972 amendatory act added the phrase, "or any other equitable relief as the court deems appropriate." 42 U. S. C. A. § 2000-5, p. 357.

(h) The Provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

* * *

## B. EXCERPTS FROM FEDERAL RULES OF CIVIL PROCEDURE

### Rule 8.

### GENERAL RULES OF PLEADING

* * *

**(b) Defenses; Form of Denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.

* * *

**(c) Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

* * *

**(d) Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

**Rule 9.**

**PLEADING SPECIAL MATTERS**

* * *

**(c) Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

**Rule 12.**

**DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS**

* * *

**(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.

* * *

**(h) Waiver or Preservation of Certain Defenses.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

**Rule 23.**

**CLASS ACTIONS**

* * *

**(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.